

WILLIAM K. HARRINGTON
United States Trustee for Region 2
Alexander Hamilton Custom House
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By: Tara Tiantian
Trial Attorney

Hearing Date: September 20, 2023 at 10 a.m.
Objection Due: September 13, 2023 at 4 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : Chapter 11
:
ERBO PROPERTIES LLC, *et al.*¹ : Case No.: 23-10210 (LGB)
:
Debtors. : (Jointly Administered)
-----X

NOTICE OF MOTION

PLEASE TAKE NOTICE that William K. Harrington, the United States Trustee for Region 2 (the “United States Trustee”), will move this Court before the Honorable Lisa G. Beckerman, United States Bankruptcy Judge, in the United States Bankruptcy Court, One Bowling Green, New York, New York 10004 on **September 20, 2023 at 10:00 a.m.** (the “Hearing”) for an order dismissing the Chapter 11 case of Gold Mezz LLC (23-10212) or alternatively convert the case to Chapter 7, and for such other and further relief as this Court may deem just and proper.

¹ The Debtors are ERBO Properties LLC (9179) (“Erbo”), Case No.: 23-10210, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211; KOVA 521, LLC (9972) (“KOVA”), Case No.: 23-10211, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211; and Gold Mezz LLC (4741) (“Gold”), Case No.: 23-10212, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211.

PLEASE TAKE FURTHER NOTICE, that the Hearing will be held **via Zoom**. Parties wishing to appear before the Court must register for the Hearing through the Electronic Appearance Portal located on the Court's website (<https://ecf.nysb.uscourts.gov/cgi-bin/nysbAppearances.pl>) by no later than 4:00 p.m. one business day before the Hearing.

PLEASE TAKE FURTHER NOTICE that any responsive papers should be filed with the Court on the docket and served on the United States Trustee, at One Bowling Green, Room 534, to the attention of Tara Tiantian, Esq. (tara.tiantian@usdoj.gov), no later than **September 13, 2023 at 4 P.M.** Such papers shall conform to the Federal Rules of Civil Procedure and identify the party on whose behalf the papers are submitted, the nature of the response, and the basis for such response.

Dated: New York, New York
August 23, 2023

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE, REGION 2

By: /s/ Tara Tiantian
Tara Tiantian
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UNITED STATES BANKRUPTCY COURT
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**MOTION OF THE UNITED STATES TRUSTEE TO DISMISS, OR ALTERNATIVELY
CONVERT THE CHAPTER 11 CASE OF GOLD MEZZ LLC TO CHAPTER 7**

TO: THE HONORABLE LISA G. BECKERMAN
UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (the “United States Trustee”), hereby moves the Court for an order dismissing the Chapter 11 case of Gold Mezz LLC (23-10212) or alternatively convert the case to Chapter 7. In support of his motion, the United States Trustee represents as follows:

PRELIMINARY STATEMENT

After the membership interests in KOVA (defined below), the Debtor’s only scheduled asset, was foreclosed and transferred to SME (defined below), the Gold Mezz estate does not

¹ The Debtors are ERBO Properties LLC (9179) (“Erbo”), Case No.: 23-10210, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211; KOVA 521, LLC (9972) (“KOVA”), Case No.: 23-10211, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211; and Gold Mezz LLC (4741) (“Gold”), Case No.: 23-10212, with a mailing address at 551 Bedford Avenue, Brooklyn, NY 11211.

appear to have any asset left to be maximized in value or administered in bankruptcy. Gold Mezz is a holding company created for the purpose of mezzanine financing. It does not have an ongoing business operation, does not have employees, and appears to have generated no revenue. Having Gold Mezz remain in Chapter 11 necessarily incurs a series of costs, such as legal fees and U.S. Trustee quarterly fees. KOVA and ERBO (defined below) are now under new management and have retained new counsel who is guiding ERBO's bankruptcy case. It does not appear necessary or proper for Gold Mezz to remain in Chapter 11, and thus dismissal is warranted.

FACTUAL BACKGROUND

1. On February 13, 2023, Erbo Properties LLC ("ERBO"), KOVA 521 LLC ("KOVA"), Gold Mezz LLC ("Gold Mezz") (collectively the "Debtors") filed a voluntary petition under Chapter 11 of the Bankruptcy Code. ECF No. 1.

2. According to the 1007 Affidavit, Gold Mezz owns KOVA and KOVA owns ERBO. ERBO is the fee owner of a property located at 541-545 West 21st Street, New York, NY. Gold Mezz is the mezzanine borrower that pledged the membership interest in KOVA ("Pledged Interest") to the mezzanine lender, 541 W 21 SME LLC ("SME"). *See* ECF No. 5; Gold Mezz ECF No. 5.

3. The Bodek family, including Erno Bodek, Rachel Bodek, and Lazzar Bodek, each own approximately one-third of membership interest in Gold Mezz. *Id.*

4. Erno Bodek is the Managing Member of the Debtors. ECF No. 5.

5. The Debtors are jointly administered for procedural purpose only, with ERBO being the main debtor² pursuant to the court order entered on February 14, 2023. ECF No. 6.

² Unless otherwise noted, the ECF numbers here refer to the docket of ERBO.

6. No statutory committee, trustee, or examiner has been appointed to date.

Debtor Gold Mezz

7. According to the 1007 Affidavit, Gold Mezz and KOVA were created for the purpose of obtaining mezzanine financing from SME. *See* ECF No. 5; Gold Mezz ECF No. 5

8. According to the schedules, Gold Mezz's only asset is its membership interests in KOVA. Gold Mezz Docket ECF No. 3.

9. Additionally, according to the UCC Public Sale Notice filed by SME, "it is the understanding of the secured party [SME] that the membership interests constitute the principal asset of Borrower [Gold Mezz]." ECF No. 122 Ex.1.

10. Gold Mezz did not schedule any creditors other than SME. *See* Gold Mezz Docket ECF No. 3.

11. According to Gold Mezz's Statement of Financial Affairs, Gold Mezz does not have any revenue from business or otherwise. ECF No. 25.

12. According to monthly operating reports ("MOR") filed to date, Gold Mezz's post-petition income appears to be zero. *See* ECF Nos. 70, 111, 112.

13. While a bar date order was not yet entered, four proofs of claim were filed in Gold Mezz's case to date. Other than SME's claim, the other three appear to be general unsecured claims and were asserted against Gold Mezz as well as the other two Debtors. *See* Claim Registers in ERBO and Gold Mezz.

SME's Lift Stay Motion

14. On June 7, the Court entered an *Order Modifying the Automatic Stay*, permitting SME to proceed with the UCC sale of the Pledged Interest. ECF No. 98.

15. SME was the only bidder at the auction and the successful bidder. ECF No. 122 ¶¶ 8-10.

16. On July 12, 2023, the Court granted SME's *Motion for an Order Terminating the Automatic Stay Pursuant to U.S.C. § 362 and Other Related Relief*, ECF No. 54, (the "Lift Stay Order"). ECF No. 128.

17. Pursuant to the Lift Stay Order, SME or its designee shall possess the Pledged Interests of KOVA and thereby exclusively control ERBO, and the Bodek family was directed to relinquish control of ERBO and KOVA to SME or its designee. *Id.*

18. SME or its designee has taken over the management and control of KOVA and ERBO and hired new counsel for those two debtors, Kirby Aisner & Curley LLP, whose retention application was approved on August 23, 2023. ECF No. 140.

19. On August 22, 2023, the Court granted the request from Tarter Krinsky & Drogin LLP ("TKD") to withdraw counsel for KOVA and ERBO. ECF No. 139. TKD continues as Gold Mezz's counsel until further order of the Court. *Id.*

LEGAL ARGUMENT

Under Section 1112 of the Bankruptcy Code, the Court shall dismiss or convert a Chapter 11 case if cause exists, whichever is in the best interest of the estate and creditors, unless the court determines the appointment of a trustee or examiner is in the best interest of the estate and creditors. 11 U.S.C. § (b)(1). The list of cause under section 1112(b)(4) is illustrative and non-exhaustive. *See In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1311 (2d Cir. 1997); *In re Century/ML Cable Venture*, 294 B.R. 9, 34 (Bankr. S.D.N.Y. 2003).

The Bankruptcy Court No Longer Appears to be the Proper or Necessary Forum for Gold Mezz

Having Gold Mezz remain in Chapter 11 does not serve an apparent bankruptcy purpose at this point. In other words, the bankruptcy Court does not appear to be the proper or necessary forum for Gold Mezz to sort out its affairs. Chapter 11 embraces “the two recognized policies of preserving going concerns and maximizing property available to satisfy creditor.” 7 Collier on Bankruptcy P 1112.04 (16th 2023) (quoting *Bank of America Nat’l Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ ship*, 526 U.S. 434, 435, 119 S. Ct. 1411, 1413, 143 L. Ed. 2d 607 (1999)). The purpose of a business reorganization case is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. H.R. Rep. No. 95-595 at 220 (1977).

As a result of the Lift Stay Order, Gold Mezz’s only scheduled asset has been foreclosed by SME and now belongs to SME. Because SME – the only bidder at the auction – credit bid, the auction did not result in a cash infusion into the estate. Based on records to date, Gold Mezz does not appear to have any asset left to be maximized in value or administered in the bankruptcy case. Remaining in Chapter 11 will cause Gold Mezz to continue to incur legal fees and to be responsible for UST quarterly fees. Taking these facts and circumstances into account, there seems to be no apparent logic, purpose, or benefit to having Gold Mezz remain in Chapter 11. *See In re 312 W. 91st Street Co.*, 35 B.R. 346, 347 (Bankr. S.D.N.Y. 1983) (“Without a reasonable amount of assets and a feasibly operating business there is no logic in continuing a Chapter 11 [case].”).

Diminution to the Gold Mezz Estate and the Absence of Reasonable Likelihood of Rehabilitation.

Among the list of cause is "substantial or continuing loss of or diminution to the estate and absence of reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

Regarding the first prong, in the case of a non-operating debtor, continued accrual of administrative expenses without corresponding income may constitute substantial or continuing loss as contemplated by section 1112(b)(4)(A). 7 Collier on Bankruptcy P 1112.04 (16th 2023). Gold Mezz is a non-operating entity created for the purpose of holding shares and obtaining the mezzanine loan. It does not generate revenue on its own, which is reflected in Statement of Financial Affairs and the monthly operating reports. *See* ECF Nos. 25, 70, 111, 112. At the same time, UST fees and professional fees have been incurred postpetition. It is reasonable to conclude that the Gold Mezz estate is in a state of diminution and loss in value.

Regarding the second prong, “rehabilitation means to reestablish a business.” 7 Collier on Bankruptcy P 1112.04 (16th 2023). “Courts have consistently understood ‘rehabilitation’ to refer to the debtor's ability to restore the viability of its business and it does not include liquidation.” *Loop Corp. v. United States Tr.*, 379 F.3d 511, 516 (8th Cir. 2004). Gold Mezz, an entity created specifically for financing purposes, never has business operations other than holding membership interests in KOVA. Now, the membership interests have been foreclosed and sold. There appears to be no business to be reorganized or restored. Therefore, cause exists under section 1112(b)(4)(A).

Dismissal Will Not Prejudice Creditors’ Interest

The dismissal of Gold Mezz’s case does not appear to prejudice any party’s interest. The non-SME creditors who filed proofs of claim also asserted their claims against KOVA and ERBO, and therefore may be satisfied from their estates. To the extent parties assert that there were properties allegedly transferred from Gold Mezz to third-party transferees, should the Court dismiss this case, parties will not be precluded from pursuing their rights with respect to those alleged transfers.

CONCLUSION

Based on the foregoing, the U.S. Trustee respectfully requests the Court dismiss the case of Gold Mezz LLC, or alternatively convert it to Chapter 7, and grant other relief the Court deems just and proper.

Dated: New York, New York
August 23, 2023

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE, Region 2

By: /s/ Tara Tiantian
Tara Tiantian
Trial Attorney
Alexander Hamilton Custom House
One Bowling Green, Room 534
New York, NY 10014

Exhibit A
Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re: : Chapter 11
:
ERBO PROPERTIES LLC, *et al.*¹ : Case No.: 23-10210 (LGB)
:
Debtors. : (Jointly Administered)
-----X

ORDER DISMISSING THE CHAPTER 11 CASE OF GOLD MEZZ LLC (23-10212)

Upon the Motion of the United States Trustee to Dismiss or Convert the Chapter 11 Case of Gold Mezz LLC (the “Motion”); and the Court having held a hearing on the Motion on September 20, 2023; and upon the record of the hearing; and the Court after due deliberation having found (1) proper notice has been given, (2) cause has been shown and (3) dismissal is in the best interest of the estate and creditors; it is hereby

ORDERED that the Motion is granted; and it is further

ORDERED that the Chapter 11 case of Gold Mezz LLC (23-10212) is dismissed; and it is further

ORDERED that the Gold Mezz LLC shall file an affidavit setting forth the disbursement made during the applicable period before dismissal and timely remit to the U.S. Trustee any fees due and owing under pursuant to 28 U.S.C. § 1930(a)(6).

Dated: New York, New York
_____, 2023

Honorable Lisa G. Beckerman
United States Bankruptcy Judge

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